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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY EUGENE LYND,

Defendant and Appellant.

F076308

(Super. Ct. No. F16900224)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. F. Brian Alvarez, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury found appellant Jeremy Eugene Lynd guilty of attempted robbery (Count 3; Pen. Code, §§ 664/211);¹ assault with a deadly weapon, a vehicle (Count 4; § 245, subd. (a)(1)); and assault with a stun gun or taser (Count 5; § 244.5, subd. (b)).² In a bifurcated proceeding, the trial court found Lynd had three prior serious and/or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)), and three prior serious felony convictions (§ 667, subd. (a)(1)).³

The trial court sentenced Lynd to 25 years to life under the three strikes law on the attempted robbery. It stayed the terms on the other two convictions pursuant to section 654. The trial court also imposed two consecutive five-year terms on the prior serious felony convictions tried separately (§ 667, subd. (a)(1)), for a total prison term of 35 years to life.

We disagree with Lynd that the trial court abused its discretion when it refused to dismiss at least two of his three prior strike convictions pursuant to the provisions of section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).⁴ In supplemental briefing, Lynd contends that his case must be remanded for resentencing in light of Senate Bill No. 1393 to allow the trial court an opportunity to exercise its discretion to dismiss or strike the section 667, subdivision (a)(1) enhancements. Respondent agrees, as do we.

¹ All further statutory references are to the Penal Code unless otherwise stated.

² Lynd’s codefendant was charged in Counts 1 and 2.

³ The trial court also found true a prior conviction under section 667.5, subdivision (a), which it later vacated, finding the enhancement did not apply to Lynd.

⁴ Lynd also alleged the trial court erred when it imposed a third-strike sentence on his assault with a deadly weapon conviction, arguing it was not a serious or violent felony under sections 1192.7, subdivision (c) and 667.5, subdivision (c). Respondent disagreed and, in his reply brief, Lynd acknowledged the respondent was correct and withdrew his argument.

STATEMENT OF THE FACTS⁵

In the early morning of January 8, 2016, as Steven P. was waiting at an ATM machine for a receipt following his transaction, Lynd approached Steven P. and hit him in the back of the neck and the lower back with a stun gun. Steven P. ran towards his car. Lynd followed and yelled at him to drop his wallet. Steven P., who once worked as a police officer, opened his car door, grabbed a gun, and pointed it at Lynd and told him to get down on the ground. Lynd instead ran toward a vehicle being driven by codefendant Bobbie Sue Sevier and got into the front seat of the vehicle.

Sevier backed up the vehicle very quickly towards Steven P., who moved out of the way. Sevier's vehicle hit Steven P.'s vehicle. Sevier then drove forward, backed up and hit Steven P.'s vehicle a second time. When Sevier drove toward Steven P., Steven P. shot at Sevier's vehicle. Sevier then crashed her vehicle into a cement planter. Lynd got out of the vehicle and ran. Sevier got out of the vehicle as well, said she had been shot and went into the restroom of a nearby Starbucks.

Steven P. called 911 and Police Officer Tracy McReynolds arrived at the scene. Sevier, who had been shot, was transported to a hospital by ambulance. Her vehicle was transported to a tow yard, and a stun gun was later found in the front passenger seat. A surveillance video from the ATM was played for the jury.

Later that day, Steven P. identified Lynd from a photographic lineup as the person who assaulted him. At the hospital, Steven P. identified Sevier as the driver of the vehicle. Lynd was arrested within a day.

⁵ The statement of the facts is brief as the issues pertain to sentencing.

DISCUSSION

I. *ROMERO* MOTION

Lynd contends first that the trial court erred in denying his *Romero* motion. He argues he is outside the scheme of the three strikes law for multiple reasons.

Disagreeing, we affirm.

Background

Before sentencing, Lynd filed a motion asking the trial court to exercise its discretion to dismiss “at least two” of his prior strike convictions. As reasoning, Lynd noted the passage of time—“ten and eleven years”—between the prior strike convictions and his current offenses. He argued he had a drug addiction needing treatment and he had the support of friends and family. Lynd also argued that, if the trial court struck all but one of his prior strike convictions, he would still remain subject to a lengthy determinate sentence.

In denying Lynd’s request, the trial court methodically addressed the law on the subject and then addressed Lynd’s “long criminal history,” stating:

“[I]t ... commenced in 2001 for a misdemeanor violation of receiving a stolen motor vehicle and, in fact, he was on conditional probation in Stanislaus County. On September 7th 2001, when he re-offended in Tuolumne County, October 23rd, 2001. On October 23rd, he was arrested for felony vehicle evading and granted five years formal felony probation out of Tuolumne County on December 21st, 2001. On March first 2002, he was involved in receiving a stolen motor vehicle in possession of fraudulent money orders and convicted of misdemeanor offenses for these actions in Stanislaus County and sentenced on March 25th, 2002. Again, on September 28th, 2002, he was arrested for car-taking and granted three years formal felony probation in Stanislaus County along with felony probation for escaping from Stanislaus County Jail, the conviction occurring—sentence on April 28th, 2004. Then again about December 10th, 2004, he was involved in two armed bank robberies and prosecuted by the U.S. Attorney’s Office. Thereafter, on or about February the 15th, 2005, he was involved in the second-degree robbery in Santa Clara County. And on or about October 25th, 2005, he was convicted of two armed bank robberies and sentenced to federal prison for a term of 120 months or 10 years. And thereafter on September the 28th, 2006, he was convicted and

sentenced to three years concurrent term for a second-degree robbery. That term from the Santa Clara County Superior Court.

“Noting, as the People do, that he was on a grant of federal probation, he was released on federal probation on or about July the 10th, 2014 for these bank robbery convictions. And then we have evidence here that he robbed Kayla Fink in January of 2016. She testified to that and that was in Turlock, California. And several days later, in this case, he assaulted and attempted to rob Mr. [P.]. And, in fact, as stated, he was on federal supervision when he committed the current offenses for which he was charged. This is not, again, a case in which the defendant’s particulars, character, and prospects should be afforded relief by this Court.”

Applicable Law and Analysis

Lynd contends the trial court abused its discretion in denying his *Romero* motion to strike his prior strikes. He argues the trial court should have done so because the prior strikes were remote in time, and when he was released from prison in July of 2014, he did well “for more than a year” before relapsing into drug use and the commission of the current offenses. We disagree.

Section 1385, subdivision (a), gives the trial court authority, on its own motion or upon application of the prosecution “and in furtherance of justice,” to order an action dismissed. In *Romero*, our Supreme Court held a trial court may utilize section 1385 to strike or dismiss a prior strike for purposes of sentencing under the three strikes law. (*Romero, supra*, 13 Cal.4th at p. 504.) The ruling denying a request to dismiss a prior strike allegation “is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)).

“‘[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.’ [Citation.] To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for

abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” [Citation.]

“Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. ‘[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, “in furtherance of justice” pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]” (*Carmony, supra*, 33 Cal.4th at p. 377.)

“[T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.) It is not enough to show reasonable people might disagree about whether to strike a prior conviction allegation, and a reviewing court shall affirm the trial court’s ruling where the record demonstrates the court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law. (*Ibid.*) “Because the circumstances must be ‘extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Ibid.*)

Although the Legislature and electorate have passed several laws modifying some of the more punitive aspects of the three strikes scheme, these reforms do not impact our analysis here.

Our review of these considerations shows the trial court did not abuse its discretion in denying Lynd’s *Romero* motion. In ruling on the motion, the court recited

the applicable standard on the record and addressed Lynd's criminal history, showing him to be "an exemplar of the "revolving door" career criminal to whom the Three Strikes law is addressed." (Carmony, *supra*, 33 Cal.4th at p. 379.) The court's decision was well-reasoned and certainly not "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

II. SENATE BILL NO. 1393

In supplemental briefing, Lynd contends his case must be remanded for resentencing in light of Senate Bill No. 1393 to allow the trial court an opportunity to exercise its discretion with respect to the section 667, subdivision (a)(1) enhancements. Respondent agrees, as do we.

Background

In a bifurcated proceeding, the trial court found true the alleged section 667, subdivision (a)(1) enhancements. At the September 11, 2017, sentencing hearing, the trial court imposed a total term of 35 years to life, which included two five-year terms for the section 667, subdivision (a)(1) enhancements tried separately.

Applicable Law and Analysis

Senate Bill No. 1393 (2017-2018 Reg. Sess.), signed into law on September 30, 2018, and effective on January 1, 2019, amended sections 667 and 1385 to give trial courts discretion to strike serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1, 2.) Under the versions of these statutes at the time of sentencing, the trial court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subdivision (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subdivision (b).)

The parties agree that Senate Bill No. 1393 applies retroactively to defendants whose judgments are not yet final on the statute's operative date. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; *In re Estrada* (1965) 63 Cal.2d 740, 745.) The parties

also agree the matter should be remanded for an exercise of discretion by the trial court to consider whether to dismiss Lynd's two section 667, subdivision (a)(1) prior serious felony enhancements. Consistent with the case law on this issue, we accept the parties' position.

III. ABSTRACT OF JUDGMENT

Respondent, in its opening brief, notes that the abstract of judgment, form CR-292, which lists the indeterminate terms, did not accurately reflect the sentence imposed. The two five-year terms originally imposed pursuant to section 667, subdivision (a)(1) were not listed on form CR-292 at item 3. As discussed in part II, above, we are remanding with directions that the trial court exercise its discretion to impose or strike the five-year prior serious felony enhancements imposed pursuant to section 667, subdivision (a)(1). Once it has done so, it must accurately reflect that decision on form CR-292 at item 3.

Respondent also notes that the abstract of judgment, item 7, indicates there are additional determinate terms on a separate form (CR-290), but no such form is included in this record. Count 5, for which a six-year stayed determinate term was imposed, is incorrectly listed on CR-292 at item 1. Count 5 must be deleted from form CR-292 and instead listed on a form CR-290.

As for count 4, for which a 25-year-to-life term was imposed and stayed, it is accurately listed on form CR-292 at item 1, but it must also be included at item 6, subsection b, which lists the counts in which the defendant is sentenced to a 25-year-to-life-term.

"When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 89.) The abstract of judgment must be corrected to accurately reflect the judgment. The abstract of judgment will need to be amended to reflect the court's resentencing on remand regardless.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under section 667, subdivision (a)(1) and 1385 as amended by Senate Bill No. 1393, and if appropriate, following exercise of that discretion, to resentence Lynd accordingly. Taking into consideration the necessary corrections to the abstract of judgment noted in part III, above, the trial court is directed to make those changes and provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

FRANSON, J.

WE CONCUR:

DETJEN, Acting P.J.

MEEHAN, J.